FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 309.

ASA RAY FRENCH and GLENDA BEATRICE FRENCH,
Petitioners,

vs.

DONALD LINDLEY FRENCH, a Minor, by Mildred B. French, his Mother and Next Friend, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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McGUIN PUBLISHING CO., WICHITA

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STATUTES—MISCELLANEY.

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MAY IT PLEASE THE COURT:

Your Respondent, Donald Lindley French, a Minor, by Mildred B. French, his mother and next friend, in opposition to the petition for writ of certiorari and supporting brief, respectfully shows to this Honorable Court:

A.

OPINIONS BELOW.

Only opinion of the District Court of Ford County, Kansas, is that embodied in the Journal Entry of Judgment (R. b, 9). It is not reported.

Opinion of the Supreme Court of Kansas is reported in 161 Kan. (Adv. Sheet) 327, 167 P. (2d) 305, and appears at page 24 of the Record. The opinion denying motion for rehearing is not and won't be reported; it appears at page 33 of the record.

B.

JURISDICTIONAL STATEMENT.

(1) Jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended (28 U. S. C. A. § 344).

(2) Judgment of the Kansas Supreme Court was entered 6 April 1946 (R. 23, 24). Motion for rehearing (R. 30) was denied on 10 May 1946 (R. 33). Petition for writ of certiorari was filed 18 July 1946.

(3) No issue as to validity of the subject contract under Act of 12 August 1935, Chapter 410, § 3, as amended (38 U.S.C.A. § 454a), was specially set up or claimed in Petitioners' pleadings in the trial court (Answer, R. 7-9; Motion for New Trial, R. 11). The trial court's judgment does not indicate this issue was determined (R. b-d, 9-11). It was not designated in the notice of appeal (R. a, 12) or specification of errors (R. 19) to the Kansas Supreme Court, nor was it determined by that court (R. 24-29). The contention that the contract violated said statute was first raised on motion for rehearing (R. 30-31), which motion was denied without opinion (R. 33). That the judgment below was violative of the "full faith and credit" clause (Article IV, Section 1, United States Constitution) and of the "due process" clauses (Amendments V and XIV, United States Constitution) was urged for the first time in the instant petition for writ of certiorari.

C.

STATEMENT OF THE CASE.

This was an action to recover $5,000, being one half the proceeds of U. S. Government Life Insurance (R. 7). Respondent, plaintiff below, is the insured's son (R. 3). Petitioners, defendants below, are the insured's parents (R. 5).

Respondent's petition alleged his father, a U. S. N. R. Ensign (R. 5), purchased a $10,000 U. S. Government Life Insurance policy on 29 April 1940 (R. 5), naming Petitioners beneficiaries (R. 5). Before making application for the policy the insured told his parents, the Petitioners, he planned to procure such policy and designate Petitioners as beneficiaries, but that, should he die, he wanted Petitioners to pay half the policy proceeds to Respondent and the other half to Respondent's mother (R. 4-5). Petitioners agreed (R. 5). The insured died in 1943 (R. 6). Petitioners received the policy proceeds (R. 6), $5,000 of which they held "as trustee for" Respondent (R. 6). Despite proper demand, Petitioners refused to carry out the agreement (R. 6-7).

Petitioners' answer admitted all allegations of the petition (R. 7-9), except it denied the agreement (R. 8) and alleged such an agreement would be "void and illegal" (R. 9).

At the trial, Respondent introduced evidence to establish the agreement (R. 10, 16-17). Petitioners moved for judgment on the evidence and pleadings (R. 10, 15), which motion was overruled (R. 10, 15). Petitioners then demurred to the evidence as failing "to show any right of recovery" or "to prove any cause on which to base a judgment" (R. 10, 14). The demurrer was overruled (R.

10, 15). Petitioners elected to stand on their demurrer (R. 10, 15). The trial court then discharged the jury (R. 10, 15), found generally for Respondent (R. 10), and specifically found Petitioners were bound by the agreement (R. 10, 15.) Judgment was entered accordingly (R. 10, 11).

Petitioners filed motion for new trial on the ground of "erroneous rulings" and that the judgment was "contrary to" and "not supported by" the evidence and was "contrary to law" (R. 11). The motion was overruled (R. 11).

Appeal was taken to the Kansas Supreme Court (R. 12). Petitioners' specification of errors (R. 12) was couched in vague generalities. It did not cite or suggest violation of the Act of 12 August 1935, Chapter 410, § 3 (38 U. S. C. A. § 454a) or any provision of the United States Constitution (R. 12).

In their brief to the Kansas Supreme Court, Petitioners specified only three "Questions Involved" (Brief of Appellant, p. 2):

> "1. Was there a contract made between Donald Ray French, the insured, and his father and mother, Asa Ray French and Glenda Beatrice French, the beneficiaries, upon which the plaintiff is entitled to recover the proceeds of the insurance?
>
> "2. When the appellants collected the proceeds of the insurance policy, did they become trustees of a constructive and/or resulting trust (as claimed by plaintiff) or any other sort of trust, for the benefit of the appellee?
>
> "3. Was there a change of beneficiaries in the insurance policy, which would make the plaintiff the beneficiary (equitable or actual) and entitle him to the proceeds of the insurance?"

The only argument presented in their brief, in support of their first "Question Involved", was that the contract was void for lack of mutuality (cf. R. 28-29) and consideration (cf. R. 28). For their second proposition, Petitioners relied upon revocability and absence of a trust res, under an earlier Kansas Supreme Court decision (cf. R. 29). With reference to the third issue, Petitioners cited *Bradley v. United States, et al.,* 143 F. (2d) 537 (C. C. A. 10, 1944) as establishing the insured had not effected a change of beneficiary. Petitioners did *not* quote from or discuss the one portion of the Bradley opinion wherein validity of an agreement as to insurance proceeds was considered, did not cite or refer to 38 U. S. C. A. § 454a; and the Kansas Supreme Court, having determined the other two questions adversely (R. 25-29), was not required to and did not pass upon Petitioners' third contention (R. 25-29).

Petitioners submitted the case to the Kansas Supreme Court upon their brief, without oral argument (R. 23, 25), and that court did not pass upon the federal issues raised by the instant petition for writ of certiorari (R. 24-29).

Petitioners then filed a motion for rehearing wherein they urged, for the first time (cf. implied admission in paragraph 1 of said motion—R. 30), that the judgment violated 38 U.S.C.A. § 454a (R. 30-32). Even in that motion no contention was made that any provision of the United States Constitution was involved (R. 30-32). The motion was denied without opinion (R. 33). Whereupon Petitioners filed the subject petition for writ of certiorari.

D.

QUESTIONS PRESENTED.

Although largely confined to the questions posed by Petitioners (Petition, pp. 4, 13), Respondent considers the following question necessarily involved:

Does the record herein affirmatively show the issues raised by Petitioners were specially and specifically set up, at the proper time and in the proper manner, for decision by the Kansas Supreme Court, were necessary to that court's decision, and were actually determined thereby?

E.

SUMMARY OF ARGUMENT.

1. No issue as to validity of the instant agreement under 38 U. S. C. A. § 454a was presented to or passed upon by the Kansas Supreme Court. The record fails to show such issue was raised in the state trial court, nor was it specified in the notice of appeal, specification of errors, or statement of questions involved in Petitioners' brief to the Kansas Supreme Court. The Kansas Supreme Court did not pass upon the issue in its opinion. First raising the issue upon motion for rehearing was too late, at least when the Kansas Supreme Court denied the motion without opinion. The other, constitutional issues were never raised in the state courts at any time. Therefore, no jurisdiction exists to issue writ of certiorari.

2. The agreement in controversy is between *the insured* and the named beneficiaries, for the benefit of a third person. It is not a contract to "assign" the policy

"proceeds", but is more in the nature of a designation of new beneficiary, and the only statute applicable is 38 U. S. C. A. § 511. The authorities unanimously recognize and enforce such agreements, providing the third party beneficiary or cestui que trust is within the allowable class of beneficiaries of government insurance under 38 U. S. C. A. § 511. Petitioners' reliance is upon decisions dealing with agreements between named beneficiaries and third persons, *to which the insured is not a party,* and which, therefore, constitute agreements to assign the policy proceeds in violation of 38 U. S. C. A. § 454a. The distinction is obvious and well recognized, and no substantial federal question is posed by the case at bar.

F.

ARGUMENT AND AUTHORITIES.

I.

Upon the Record Herein, Petitioners Have Failed to Establish Jurisdiction of This Court to Issue a Writ of Certiorari.

The burden is upon Petitioners to show jurisdiction of this Court to issue the writ of certiorari (*Gorman v. Washington University,* 316 U. S. 98, 86 L. ed. 1300, 1942; rehearing den. 316 U. S. 711, 86 L. ed. 1777). This they have failed to do.

A. *The issues raised by Petitioners were neither properly nor timely presented in the State courts, and were not passed upon by the Kansas Supreme Court.*

Upon appeal from a decision of a lower, district court, the Supreme Court of Kansas considers only issues which were urged in the trial court (*Coryell v. Hardy,* 146 Kan. 522, 524, 72 P. 2d 457, 1937; *State Bank of Stella v. Moritz,* 146 Kan. 23, 69 P. 2d 15, 1937; *Anderson v.*

Shannon, 146 Kan. 704, 73 P. 2d 5, 1937; *Stephenson v. Wilson,* 147 Kan. 261, 76 P. 2d 810, 1938; *Fisher v. Central Surety & Ins. Co.,* 149 Kan. 38, 86 P. 2d 583, 1939; see *Baldwin v. Kansas,* 129 U. S. 52, 32 L. ed. 640, 1889). And such issues must have been fairly raised and clearly and specifically pointed out to the district court to be available on appeal (*Mystic Legion v. Brewer,* 75 Kan. 729, 733, 90 Pac. 247, 1907; *Emery v. Bennett,* 97 Kan. 490, 155 Pac. 1075, 1916; *Clark v. Linley Motor Co.,* 126 Kan. 419, 268 Pac. 860, 1928; *Merrick v. Missouri-K-T Rld. Co.,* 141 Kan. 591, 595, 42 P. 2d 950, 1935; *State v. Pyle,* 143 Kan. 722, 782, 57 P. 2d 93, 1936; *State Bank of Stella v. Moritz,* 146 Kan. 23, 69 P. 2d 15, 1937; *Todd* v. Central Petroleum Co., 155 Kan. 249, 124 P. 2d 704, 1942).

The record in this case fails to show any issue was presented to the state district court with respect to 38 U.S.C. A. § 454a or any provision of the U. S. Constitution. Neither the answer (R. 7-9) nor the motion for new trial (R. 11) even suggests any such issue. The same statement applies to the Journal Entry (R. b-d, 9-11). The rather amazing certificate of the district court judge, appendum number 1 to the petition for writ of certiorari (p. 17), can avail Petitioners nothing. It is no part of the Record herein. Even a certificate from the Chief Justice of the state court of last resort that a federal issue was presented to and passed upon by that court cannot import into the record a federal question not otherwise appearing therein, its sole office being to make certain that which is otherwise ambiguous on the face of the record (*Honeyman v. Hanan,* 300 U. S. 14, 81 L. ed. 476, 1937; app. dism. 302 U. S. 375, 82 L. ed. 312; cases cited in 28 U.S.C.A. § 344, Note 256, p. 298 et seq.) In any

event, the district judge's certificate was no part of the record before the Kansas Supreme Court upon the appeal. Therefore, the Kansas Supreme Court had no reason to suspect these issues were presented to or passed upon by the trial court.

Furthermore, for jurisdictional purposes with respect to writs of certiorari, whether a particular issue was passed upon by the state trial court is immaterial unless the issue was also raised in and decided by the highest state appellate court (*Hiawassee River P. Co. v. Carolina-Tennessee P. Co.*, 252 U. S. 341, 64 L. ed. 601, 1920).

In this connection, only errors specified in the notice of appeal (R. a, 12) are reviewable by the Kansas Supreme Court (*Allen v. Pearce Dental Supply Co.*, 149 Kan. 549, 551, 88 P. 2d 1057, 1939). And irrespective of how broad such notice of appeal may be, the only issues open to an appellant in the Kansas Supreme Court are those specified in the abstract (*Davidson v. McKown*, 157 Kan. 217, 139 P. 2d 421, 1943; *Picou v. Kansas City Public Service Co.*, 156 Kan. 452, 455, 134 P. 2d 686, 1943; *Bilby v. City of Wichita*, 151 Kan. 981, 101 P. 2nd 919, 1940; *Stockgrowers State Bank v. Clay*, 150 Kan. 93, 94-95, 90 P. 2nd 1101; 1939). This is in accordance with Rule Number 5 of the revised (15 Sept. 1942) Rules of the Supreme Court of Kansas (G. S. Kan., 1935, 60-3826):

> "The appellant's abstract shall include a specification of the errors complained of, separately set forth and numbered."

Petitioners' specification of errors (R. 19) does not refer to 38 U. S. C. A. § 454a or to any provision of the United States Constitution, nor does it fairly imply any of the federal issues relied upon in the instant petition for

writ of certiorari. Furthermore, general specifications that the trial court "erred" are nullities, it being the rule in Kansas that a litigant cannot, on appeal, rely upon any issue not clearly and unmistakably called to the Kansas Supreme Court's attention by the specification of errors (*Lambeth v. Bogart,* 155 Kan. 413, 415, 125 P. 2d 377, 1942; *Heniff v. Clausen,* 154 Kan. 717, 212 P. 2d 196, 1942; *Brewer v. Harris,* 147 Kan. 197, 75 P. 2d. 287, 1938; *Groomer v. Barnes,* 148 Kan. 482, 83 P. 2d 631, 1938; *Elbukan Oil Co. et al.* v. Lamb, 12 F. 2d 387, C. C. A. 8, 1926).

Again, Rule 6(3) (b) of the aforesaid Rules of the Kansas Supreme Court (G. S. Kan., 1935, 60-3826), requires that appellant's brief contain:

> "A statement of the question involved, or separately numbered statements of the several questions involved, in very brief and very general terms, to enable the court to acquire immediate comprehension of the nature of the controversy."

Respondent's "Statement of the Case", *supra,* sets forth verbatim the questions formulated by Petitioners in their brief to the Kansas Supreme Court; they fail to raise the federal issues now under consideration. Neither were these issues presented or discussed in Petitioners' brief to the Kansas Supreme Court. Hence even assuming, although denying, that Petitioners' specification of errors or statement of questions involved posed these issues, the Kansas Supreme Court could properly deem them abandoned and refuse to pass upon them (*Epperson v. Bennett,* 161 Kan. [Adv. Sheet] 298, 300, 167 P. 2d 606, 1946; *Henderson v. Deckert,* 160 Kan. [Adv. Sheet] 386, 162 P. 2d 88, 1945; *Sams v. Commercial Standard Ins. Co.,* 157 Kan. 278, 139 P. 2d 859, 1943; *Carrington v.*

British American Oil Producing Co., 157 Kan. 101, 138 P. 2d 463, 1943; *Tri-State Hotel Co. Inc. v. Southwestern Bell Telephone Co.*, 155 Kan. 358, 125 P. 2d 728, 1942; *In re Estate of Horton*, 154 Kan. 269, 276, 118 P. 2d 527, 1941; *Tawney v. Blankenship*, 150 Kan. 41, 90 P. 2d 1111, 1939; *Smith v. Kagey*, 146 Kan. 563, 570, 73 P. 2d 46, 1937).

Petitioners did finally raise the issue of whether the contract violated 38 U. S. C. A. § 454a by motion for rehearing (R. 30-31) filed after the Kansas Supreme Court had rendered its opinion (although even in that motion no contention was made that the judgment contravened any provision of the United States Constitution). But since the opinion in *Headley v. Challis*, 15 Kan. 453 (1875), written by Mr. Justice Brewer, it has been well settled in Kansas that:

> "Where a case has once been submitted and decided, this court will not, as a rule, upon a motion for rehearing, consider any question not presented upon the original hearing." (Syl. 1)

Among the many Kansas decisions to this effect are: *United Artists Corp. v. Mills*, 136 Kan. 33, 12 P. 2d 785 (1932); *Carlgren v. Saindon*, 130 Kan. 1, 284 Pac. 623 (1930); *Craig v. St. Louis-S. F. Rly. Co.*, 120 Kan. 427, 243 Pac. 1050 (1926); *Brown v. Oil Co.*, 114 Kan. 482, 218 Pac. 998 (1913); *Mollohan v. Patton*, 110 Kan. 667, 205 Pac. 643 (1922); *Blair v. McQuary*, 100 Kan. 206, 164 Pac. 262 (1917); *Beeler v. Sims*, 93 Kan. 213, 144 Pac. 237 (1914); *State v. Coulter*, 40 Kan. 673, 20 Pac. 525 (1889); and *Western News Co. v. Wilmarth*, 34 Kan. 254, 8 Pac. 104 (1885). Very properly, therefore, the Kansas Supreme Court denied the motion for rehearing without opinion (R. 33).

It is submitted no "federal issue" was timely or properly presented to or determined by the Kansas Supreme Court.

B. *Failure of the Kansas Supreme Court to Pass Upon Any Federal Issue Is Fatal to This Courts' Certiorari Jurisdiction.*

At the outset it is noted that Petitioners, in formulating "Questions Presented" per Rule 38, paragraph 2, of the Rules of this Court, attempt to predicate federal issues upon Section 1, Article IV ("full faith and credit" clause) and Amendments V and XIV ("due process" clauses) of the United States Constitution.

For several reasons these constitutional issues are unavailable to Petitioners. Such issues were never presented to or considered by the Kansas Supreme Court at any time, and no issue not asserted in and passed upon by the state supreme court is ground for certiorari (*McGoldrick v. Gulf Oil Corp.*, 309 U. S. 430, 84 L. ed. 849, 1940). Even assuming, *arguendo,* a proper federal issue as to 38 U. S. C. A. § 454a had been raised in the Kansas Supreme Court, this would not authorize Petitioners' reliance upon these additional constitutional issues (*Montana ex rel. Haire v. Rice,* 204 U. S. 291, 51 L. ed. 490, 1907; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 1899). Again, Rule 27, paragraph 2(3) of the Rules of this Court requires a specification in Petitioners' brief of the errors relied upon; paragraph 6 of Rule 27 provides all errors not so specified will be disregarded (and see *Flournby v. Weiner,* 321 U. S. 253, 259, 261, 263, 88 L. ed. 708, 1944; *Donnelley v. U. S.*, 276 U. S. 505, 511, 72 L. ed. 676, 1927; *New York ex rel. Rosevale Realty Co. v. Kleinert*, 268 U. S. 646, 651, 69 L. ed. 1135, 1925). Petitioners' specification of errors (Brief, p. 13) and "sum-

mary of argument" (Brief, p. 13) fail to assert the constitutional issues. Too, the "full faith and credit" clause (Section 1, Article IV) merely requires each state to recognize the statutes, records, and judicial proceedings "of every other *State",* and has no application to federal enactments. Likewise the "due process" clause of the Fifth Amendment applies only to the federal government (*Chapin v. Fye,* 179 U. S. 119, 45 L. ed. 119, 1900). In any event, the constitutional issues add nothing to Petitioners' "title, right, privilege or immunity" under 38 U. S. C. A. § 454a insofar as the appropriate jurisdictional statute (28 U. S. C. A. § 344 (b)) is concerned.

With reference to Petitioners' alleged rights under 38 U. S. C. A. § 454a, it is well established that, to vest this Court with certiorari jurisdiction, it must affirmatively appear from the record that the federal question (whether the subject contract is violative of said statute) was properly presented to the Kansas Supreme Court for decision, that its decision was necessary to a determination of the cause, and that it was actually decided by the Kansas court (*Congress of Industrial Organizations v. McAdory,* 325 U. S. 472, 89 L. ed. 1741, 1945; *Charleston Fed. Sav. & L. Asso. v. Alderson,* 324 U. S. 182, 89 L. ed. 857, 1945; *McGoldrick v. Gulf Oil Corp.,* 309 U. S. 430, 84 L. ed. 849, 1940; *Southwestern Bell Telegraph Co. v. Oklahoma,* 303 U. S. 206, 82 L. ed. 751, 1945; *Honeman v. Hanan,* 300 U. S. 14, 81 L. ed. 476, 1937, appeal dism. 302 U. S. 375, 82 L. ed. 312; *White River Lumber Co. v. Arkansas ex rel. Applegate,* 279 U. S. 692, 73 L. ed. 903, 1929; *Mellon v. O'Neil,* 275 U. S. 212, 72 L. ed. 245, 1927; *Whitney v. California,* 274 U. S. 357, 71 L. ed. 1095, 1926; *New York ex rel. Rosevale Realty Co. v. Kleinert,* 268 U. S. 646, 69 L. ed. 1135, 1925; *El Paso &*

S. W. R. Co. v. Eichel & Weikel, 226 U. S. 590, 57 L. ed. 369, 1913; *Cincinnati N. O. & T. P. R. Co. v. Slade,* 216 U. S. 78, 54, 54 L. ed. 390, 1910; cases cited in 28 U. S. C. A. § 344, Note 49, p. 231 et seq.).

The statute (28 U. S. C. A. § 344 (b)) requires that the federal issue be "specially set up or claimed" in cases such as this (where the validity of a statute or treaty is not involved), and this necessitates a showing that the federal issue was specifically and pointedly called to the Kansas Supreme Court's attention and not obscured by generalities (*Congress of Industrial Organizations v. McAdory, supra,* 325 U. S. 472, 89 L. ed. 1741; *Charleston Fed. Sav. & L. Asso. v. Alderson, supra,* 324 U. S. 182, 89 L. ed. 857; *Herndon v. Georgia,* 295 U. S. 441, 79 L. ed. 1430, 1935, reh. den. 296 U. S. 661, 80 L. ed. 471; *New York ex rel. Rosevale Realty Co. v. Kleinert, supra,* 268 U. S. 646, 69 L. ed. 1135; *El Paso & S. W. R. Co. v. Eichel & Weikel, supra,* 226 U. S. 590, 57 L. ed. 369; *Thomas v. Iowa,* 209 U. S. 264, 52 L. ed. 782, 1908; *Harding v. Illinois,* 196 U. S. 78, 49 L. ed. 394; 1904; *Onondaga Nation v. Thacher,* 189 U. S. 306, 47 L. ed. 826, 1903; *Re Buchanan,* 158 U. S. 31, 39 L. ed. 844, 1895; see cases cited in 28 U. S. C. A. § 344, Note 221, p. 282, Note 228, p. 289, and Note 230, p. 291).

The federal issue must also have been presented to the Kansas Supreme Court timely and in a manner proper under the procedural rules of the State of Kansas (*Congress of Industrial Organizations v. McAdory, supra,* 325 U. S. 372, 89 L. ed. 1741; see cases cited in 28 U. S. C. A. § 344, Note 224, p. 284 Note 225, p. 285, Note 226, p. 286, and Note 227, p. 288). First raising the issue on motion for rehearing is too late (Radio Station *W. O. W., Inc. v. Johnson,* 326 U. S. 120, 89 L. ed. 2092, 1945;

Herndon v. Georgia, supra, 295 U. S. 441, 79 L. ed. 1530; *Bowe v. Scott,* 223 U. S. 658, 58 L. ed. 1141, 1914; *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 112, 53 L. ed. 431, 1909; *Corkran Oil & D. Co. v. Arnaudet,* 199 U. S. 182, 50 L. ed. 143, 1905; *McMillen v. Ferrum Mining Co.,* 197 U. S. 343, 49 L. ed. 784, 1905; *Mutual Life Ins. Co. of N. Y. v. McGrew,* 188 U. S. 291, 47 L. ed. 480, 1903; *Capital Nat. Bank of Lincoln v. First Nat. Bank of Cadiz,* 172 U. S. 425, 43 L. ed. 502, 1898; and see 28 U. S. C. A. § 344, Note 224, p. 284, and Note 227, p. 288.)

> "Nothing is better settled than that it is too late to raise a federal question for the first time in a petition for rehearing, after the final judgment of the state court of last resort." (28 U. S. C. A. § 344, Note 227, p. 288.)

If the Kansas Supreme Court decision was based in part on a "non-federal" ground, sufficient in itself to support the judgment, certiorari cannot issue (*McCoy v. Shaw,* 277 U. S. 302, 72 L. ed. 891, 1928; 28 U. S. C. A. § 344, Note 50, p. 232). This rule is applied even when it is not clear whether the state decision was in the fact premised upon a non-federal basis, so long as the opinion could or might have been so based (*Williams v. Kaiser,* 323 U. S. 471, 89 L. ed. 498, 1945; *Flournoy v. Wiener,* 321 U. S. 253, 88 L. ed. 708, 1944; *Lynch v. New York ex rel. Pierson,* 293 U. S. 52, 79 L. ed. 191, 1934; *Cox v. Thomas,* 201 U. S. 446, 50 L. ed. 1099, 1906; *Chicago, I. & L. R. Co. v. McGuire,* 196 U. S. 128, 49 L. ed. 413, 1905; *Klinger v. Missouri,* 13 Wall. 257, 20 L. ed. 635, 1872). Thus, if, by Kansas law, the Kansas Supreme Court might have refused to determine the federal issue for any procedural reason—as, for example, failure to raise the issue in the trial court, failure properly to speci-

fy such error in the abstract or brief, or failure to present the issue before motion for rehearing—writ of certiorari cannot issue (*Penn. R. Co. v. Illinois Brick Co.*, 297 U. S. 447, 80 L. ed. 796, 1936; *Herndon v. Georgia, supra*, 295 U. S. 441, 79 L. ed. 1530; *Barbour v. Georgia*, 249 U. S. 454, 63 L. ed. 704, 1919; *Missouri, K & T. R. Co. v. Sealy*, 248 U. S. 363, 63 L. ed. 296, Kan., 1919; *Mo. Pac. R. Co. v. Taber*, 244 U. S. 200, 61 L. ed. 1082, 1917; *Louisville & N. R. Co. v. Woodford*, 234 U. S. 46, 58 L. ed. 1202, 1914; *Cox v. Thomas*, 201 U. S. 446, 50 L. ed. 1099, 1906; *Chicago, I. & L. R. Co. v. McGuire, supra*, 196 U. S. 128, 49 L. ed. 413; *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 1889; see 28 U. S. C. A. § 344, Note 225, p. 285, Note 81, p. 251).

Finally, the record itself must affirmatively show these requirements have been satisfied and that the federal issue, upon which certiorari is sought, was actually raised in and determined by the Kansas Supreme Court: *Williams v. Kaiser*, 323 U. S. 471, 89 L. ed. 398 (1945); *Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. ed. 920 (1940); *Southwestern Bell Teleph. Co. v. Okla., supra*, 303 U. S. 206, 82 L. ed. 751 (1938); *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 79 L. ed. 191 (1934); *Whitney v. California, supra*, 274 U. S. 357, 71 L. ed. 1095; see 28 U. S. C. A. § 344, Note 251, p. 294 et seq. It is customary to examine the opinion of the state court of last resort in determining what issues were passed on by that court (*Indiana ex rel. Anderson* v. Brand, 303 U. S. 95, 82 L. ed. 685, 1938, reh. den. 303 U. S. 667, 82 L. ed. 1123; *Thompson v. Maxwell Land Grand & R. Co.*, 168 U. S. 451, 42 L. ed. 539, 1897), and if, as in a denial of motion for rehearing, no opinion is filed by the state court, writ of certiorari cannot issue (*Cuyahoga River Power*

Co. v. Northern Realty Co., 244 U. S. 300, 61 L. ed. 1153, 1917; *Waters-Pierce Oil Co. v. Texas, supra,* 212 U. S. 112, 53 L. ed. 431; *Corkran Oil & Do. Co. v. Arnaudet, supra,* 199 U. S. 182, 50 L. ed. 143; *Mut. Life Ins. Co. of N. Y. v. McGrew,* 188 U. S. 291, 47 L. ed. 480, 1903).

Tested by these principles, no jurisdiction to issue a writ of certiorari exists in the case at bar. No federal issue was raised by Petitioners' answer (R. 7) or motion for new trial (R. 11), and none was determined by the state district court (R. b, 9). No such issue was "specially set up or claimed" in the notice of appeal (R. 12), specification of errors (R. 19), "questions presented" in Petitioners' brief, or in the actual brief itself to the Kansas Supreme Court; and undeniably it was never "clearly and unmistakably" presented to that court. The record (R. 24-29) fails to disclose, affirmatively or by negative implication, that any federal issue was ever raised in or determined by the Kansas Supreme Court prior to the motion for rehearing (R. 30), which motion was denied without opinion (R. 33). Substantial non-federal grounds support the court's decision inasmuch as the federal issue was not properly, timely, or clearly raised. It is submitted, therefore, that the petition herein should be denied.

II.

The Judgment of the Kansas Supreme Court Does Not Contravene 38 U. S. C. A. § 454a or Any Constitutional Provision.

Inasmuch as each of the questions presented and urged by Petitioners (Petition, p. 4, 13) comes merely to the contention that the agreement, upheld by the Kansas Supreme Court decree, is void under 38 U. S. C. A. § 454a, we confine ourselves to that proposition.

Assuming, although denying, that the Kansas Supreme Court was required to and did pass upon this issue in reaching its decision in the case at bar, it is submitted such judgment would involve no novel holding, would be fully in accord with a considerable body of unanimous precedent, and would not be in contravention of 38 U. S. C. A. § 454a.

In their argument Petitioners entirely misconceive the nature and effect of the agreement which they erroneously contend is violative of the statutory mandate that:

> "Payments of benefits due or to become due shall not be assignable . . . " (38 U. S. C. A. § 454a)

This provision obviously refers to agreements between beneficiaries *and third persons* to assign insurance proceeds. There could be no conceivable justification for construing the quoted phraseology as applicable to the *insured* himself. The insured may, at any time, change the designation of beneficiary so as to "assign" the "benefits" to any person of his choosing, so long as he selects a beneficiary within the authorized class, and any agreement purporting to foreclose this right is void (*Von Der Lippi-Lipski v. U. S.,* 4 F. 2d 168, App. D. C., 1925; *Lewis v. U. S.,* 56 F. 2d 563, C. C. A. 3, 1932; see *United States v. Williams,* 302 U. S. 45, 82 L. ed. 39, 1937). It would be a peculiar distortion of the old adage to hold the insured were prohibited from doing indirectly that which he is authorized to do directly.

Respondent and his mother were both within the class of beneficiaries designated by the statute (38 U. S. C. A. § 511, 43 Stat. 624, as amended). The insured might have named them beneficiaries in the first instance. He might at any time have changed the designation of bene-

ficiaries from Petitioners to Respondent and his mother. Obviously, then—and the authorities unanimously so hold —the *insured* might contract with Petitioners that they pay the proceeds to Respondent. Such an agreement is tantamount to and is tested by the beneficiary designation provisions (38 U. S. C. A. § 511), rather than by the "assignment of proceeds" limitations (38 U. S. C. A. § 454a) of the statute. Petitioners' failure to appreciate the distinction between a contract to which the insured is a party and one between the designated beneficiaries and third persons (not including the insured) is indicated by their reference to the instant contract as one between Petitioners' and Respondent's *mother* (Petition for Writ of Certiorari, lines 3, 4, page 2).

The distinction Respondent is urging appears clearly from the following summary of the appropriate law in *American Law of Veterans* (Kimborough & Glen, 1946):

> "*Trusts in Insurance Proceeds.*—The National Service Life Insurance Act is silent with respect to the right *of an insured* to ingraft a trust upon the insurance proceeds. In the face of a similar omission in the War Risk Insurance Act the courts held that a trust *created by the insured* would be enforced . . . A trust thus created is revocable. Affirmance of the right to establish a trust in insurance proceeds does not mean that an insured can go outside the permitted class of beneficiaries and establish a trust in their favor, since to do so would be an evasion of the statutory provisions limiting the class of persons entitled to receive insurance proceeds." (§ 522, p. 396; emphasis ours)

At the same time, and in the same paragraph, the authors recognize that a similar trust or agreement between the named beneficiary and others, *to which the in-*

sured was not a party, might be invalid as an assignment of proceeds:

> "Whether an agreement *between a beneficiary and others* to share the proceeds of insurance with them would be enforceable as a trust, in view of the statutory provisions against assignment of insurance proceeds, may be open to doubt." (§ 522, p. 397; emphasis supplied)

Petitioners rely herein upon *Bradley v. United States,* 143 F. (2d) 537 (C. C. A. 10, 1944). There the insured's policy named his mother as beneficiary. Later he expressed a wish that his wife be so designated, but he neither notified his mother to such effect nor entered into any such agreement with her. After his death a fight ensued over the proceeds. In the main, the decision deals solely with the question of whether the insured had effected a valid change of beneficiary. However, the mother alleged an agreement, made after the insured's death, *between the mother and the wife,* to share the proceeds equally, and it is this agreement which the court held viotive of the non-assignment provision of 38 U. S. C. A. § 454a. To the same effect is *Robertson v. McSpadden et al.,* 46 F. (2d) 702 (E. D. Ark., 1931), and *American Law of Veterans, supra,* § 523, p. 397.

These authorities, however, are wholly out of point where, as here, the trust or agreement was entered into between the *insured* and the designated beneficiary.

Thus, in *Ambrose v. U. S.,* 15 F. (2d) 52 (W. D. New York, 1926), a soldier took out War Risk Insurance naming his sister as beneficiary. Before doing so, however, by letter and orally he instructed his sister he was designating her with the understanding she should share the policy proceeds with his other sisters and brother. After

the soldier's death, it was held this amounted to a change of beneficiary, enforceable as such. Alternatively, the court likewise held:

> "Plaintiffs also seek recovery herein on the theory that the designated beneficiary became a trustee for the combined benefit of plaintiffs and herself. The proofs . . . establish this claim. The parol agreement between her and the insured that she would divide the installments was valid, and was sufficiently broad to impress a trust upon her which a court of equity may enforce."

Similarly, in *Christensen v. Christensen,* 14 F. (2d) 475 (S. D. New York, 1926), two brother-soldiers each took out War Risk Insurance, each policy naming a third brother, Carlo, as beneficiary. The two brothers, however, entered into an agreement with Carlo that upon the death of either brother Carlo should share his insurance proceeds with the surviving brother. In a suit by the surviving brother to recover the policy proceeds from Carlo, it was held:

> "It is true that an assignment of the rights to war veterans' insurance would be invalid. However, complainant comes within the permitted class under section 300 (Comp. St. § 9127½-300) which provides that 'the insurance shall be payable to a spouse, child, grandchild, parent, brother, sister, uncle,' etc."
>
> "An oral trust is alleged to have been created at the time of taking out the insurance. This was valid under general principles of law [citations], and there is nothing in the statute which forbids it in relation to the particular insurance here involved. It amounted to the designation of the complainant as a contingent beneficiary at the time the insurance was taken out. The defendant Carlo Christensen had nothing differing from a passive or dry trust in one-half of the

> insurance. His duty was but to receive and pay over the insurance moneys."

In *Wolcott v. Wolcott,* 17 Ohio App. 48 (1920), where a soldier, contemporaneously with applying for War Risk Insurance, wrote his father that he was designating him beneficiary but instructed the father to hold the proceeds for other persons within the permitted class of beneficiaries, it was held a valid and enforceable trust was created.

Lashley v. Lashley, 212 Ala. 229, 102 So. 229 (1924), enforced a similar contract. A soldier purchased War Risk Insurance designating his brother as beneficiary. He and his brother orally agreed the brother should share the proceeds equally with the insured's other brothers and sisters. In upholding this contract after the insured's death, the court wrote (102 So. at 230):

> "We find nothing in the federal statutes or the policy which forbids this trust or the enforcement of same in the courts of this state. The creation of the trust was contingent and did not impair the right of the insured to redesignate or change the beneficiary at any time before his death."

Following *Ambrose v. U. S., supra,* 15 F. (2d) 52, an agreement between a soldier, the insured under a War Risk Insurance Policy, and his brother, the designated beneficiary, that the latter should share the proceeds equally with the insured's other brothers and sisters, was held, after the insured's death, to constitute a valid and enforceable contract in favor of the other brothers and sisters: *Kaschefsky v. Kaschefsky,* 110 F. (2d) 836 (C. C. A. 6, 1940).

Compare, also, *Duncan v. Linton,* et al., 38 Ohio App. 57, 175 N. E. 621 (1929), pet. in error dism., 121 Oh. St. 615, 172 N. E. 377. And see *Staples v. Murray*, 124 Kan. 730, 262 Pac. 588 (1928), which does not consider such an agreement void under 38 U. S. C. A. § 454a (although holding the contract unenforceable for other reasons, to which extent the case is expressly overruled by the instant opinion—R. 29). And see *Elliott v. U. S.,* 271 Fed. 1001 (N. D. Ohio, 1920), where a trust, under circumstances comparable to those here existing, was denied not because of invalidity but because the evidence failed to establish any agreement or understanding between the insured and the beneficiary.

The only decisions refusing to enforce contracts of this nature, entered into between the *insured* and the beneficiary, are those in which the insured attempted to create rights in favor of third persons outside the class of permitted beneficiaries; yet these decisions do not deny the insured's right to so contract with the designated beneficiary for the benefit of third persons *within* the allowable beneficiary class: *Jones v. U. S. et al.*, 61 F. Supp. 406 (D. Mass., 1945, and *Vincent v. Kelly, et al.,* 195 N. Y. S. 57, 118 Misc. Rep. 591 (1922).

One case which involves both an agreement between the insured and the named beneficiary (such as the contract now in controversy), and also an agreement between the named beneficiary and third persons, to which agreement the insured was not a party (the type of contract condemned in *Bradley v. United States, supra*), is of interest here. In *Calhoun v. Ussery,* 46 F. (2d) 495 (W. D. La., 1930), a soldier named his sister beneficiary under a War Risk Insurance. Later he wrote her instructions to share the proceeds with his other two sisters. There-

after he married and died, leaving two infant children surviving. The named beneficiary and her two sisters shared the policy proceeds in accordance with the contract with the insured, and the validity of this agreement is not questioned by the decision. However, thereafter, because the infant children were in necessitous circumstances, the three sisters agreed among themselves to turn over the unpaid installments, when received, to the children. The latter trust was held unenforceable, although the grounds stated in the opinion throw little light on the case at bar.

As a matter of fact the case at bar might, despite *Bradley v. United States, supra,* have been based quite properly upon the theory that the agreement between the insured and Petitioners effected a change of beneficiaries under the policy: *Kaschefsky v. Kaschefsky, supra,* 110 F. (2d) 836; *Duncan v. Linton, et al., supra,* 38 Ohio App. 57, 175 N. E. 621; *Ambrose v. U. S., supra,* 15 F. (2d) 52; *Christensen v. Christensen, supra,* 14 F. (2d) 475; see cases on "What constitutes valid change of beneficiary" under War Risk Insurance, U. S. Government Life Insurance, and National Service Life Insurance, in 55 A. L. R. at 587, et seq., 73 A. L. R. at 327 et seq., and 81 A. L. R. at 931 et seq. In *Ambrose v. U. S,* supra, 15 F. (2d) at 53, wherein the court held letters from the insured to his sister, the designated beneficiary, telling her to share the proceeds with the insured's brother and other sisters, constituted not only a valid trust, but also amounted to an effective change of beneficiary, the opinion reads:

> "Should not his [the insured's] letters to his sister, Alice, the beneficiary, expressing his wish or direction for an equal division or apportionment to

both sisters and brother, in fairness to him, be accepted as the equivalent of a written request to the bureau to include them as beneficiaries? In matters of the kind under consideration the soldier's real purpose and wish should control.

"In Claffy v. Forbes (D. C.) 280 F. 233, Judge Neterer said that it was not vital that the bureau should receive notice of the change of beneficiary before the death of the insured, and that 'throughout the history of the civilized world, since the decrees of Julius Caesar, the intention and wish of the soldier, with relation to designation of beneficiary or disposition of property, killed in the line of duty, has been carried out when ascertained, whether it was scrawled in the sand with the point of his sword, or written on the scabbard of his sword or his shield; * * * and remedial justice requires, under the facts in this case, that the designation of the niece in the letter to the mother be established from the date of presentation to and record thereof by the Bureau of War Risk Insurance.' "

If, in this case, the Kansas Supreme Court had held the agreement constituted a valid change of beneficiary, then there could be no contention that the judgment was violative of 38 U.S.C.A. § 454a, and no federal issue would be involved. And since this is a substantial non-federal ground upon which the Kansas Supreme Court judgment might have been based, it would appear certiorari cannot issue (see cases cited under Section I, B., *supra,* of this Brief).

In any event, it is submitted 38 U. S. C. A. § 454a has no application to an agreement between *the insured* and the named beneficiary to pay the proceeds to a third person, the only requirement applicable to such agreements being that such third person satisfy the beneficiary qualifications of 38 U. S. C. A. § 511.

G.

CONCLUSION.

Petitioners' brief and petition fail to demonstrate any federal issue presented to and passed upon by the Supreme Court of Kansas. Furthermore, there is no conceivable violation of 38 U. S. C. A. § 454a by the agreement held enforceable by the Kansas Supreme Court. The federal issue Petitioners raise in this case is nonexistent. Only by misconstruing the facts herein and treating the agreement as one between the designated beneficiary and a third person, rather than a contract between the *insured* and the beneficiary for the benefit of a third person, are Petitioners able to construct any controversial issue whatever, federal or non-federal.

It is submitted this Court neither can nor should issue a writ of certiorari in this case for the sole purpose of making clear to Petitioners an obvious distinction which is, and for many years has been, observed by the courts in all instances wherein agreements dealing with War Risk Insurance or United States Government Life Insurance proceeds have been litigated. Wherefore, it is respectfully submitted the petition for writ of certiorari be denied.

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